Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TRW INC.,

Petitioner,

v.

ADELAIDE ANDREWS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner demonstrated in its opening brief that the statute of limitations in Section 618 of the Fair Credit Reporting Act, 15 U.S.C. § 1681p, incorporates the traditional commencement rule rather than the discovery rule applied below by the Ninth Circuit. This conclusion is dictated by the language of Section 618 and is confirmed by the section's misrepresentation exception, the overall structure of the FCRA, and the Act's history. In addition, as the opening brief also showed, the strong presumption in favor of the discovery rule employed by the Ninth Circuit in departing from the traditional commencement rule is without foundation and, in any event, is rebutted by the text, structure, and history of Section 618. Neither respondent nor her *amici* casts any reasonable doubt upon these points.

I. THE LANGUAGE OF SECTION 618 EXPRESSES THE TRADITIONAL COMMENCEMENT RULE, NOT A GENERAL DISCOVERY RULE.

Over the last two decades, a half dozen federal courts of appeals decisions, a dozen district court decisions, and a number of commentators have all concluded that Section 618 incorporates the traditional commencement rule starting the statute of limitations when the formal right to sue under the Act attaches. *See* Pet. Br. at 12-13 nn.4-7. As the opening brief demonstrated, these decisions reflect the language of Section 618, which expresses the traditional commencement rule, *id.* at 14-16, and the decisions of this Court interpreting statutes with similar language, *id.* at 16-17. Neither respondent nor her *amici* has an answer to this demonstration.

1. Respondent's interpretation of the language of Section 618 focuses, as it should, upon the meaning of the word "arise" in the portion of the section's statute of limitations stating the general commencement rule. Contrary to respondent's contention, however, that word expresses the traditional rule, not a discovery rule.

As respondent acknowledges, Resp. Br. at 22, the word "arise" means to "come[] into existence" or to "originate." 1 *The Oxford English Dictionary* 629 (2d ed. 1989); *see also The American Heritage Dictionary* 96 (4th ed. 2000) (defining "arise" to mean "[t]o come into being; originate"); *The Random House Dictionary of the English Language* 80 (unabridged ed. 1973) ("to come into being" or to "originate"); *Webster's Third New Int'l Dictionary* 117 (unabridged ed. 1976) ("to come into being" or to "come about"). If "arise" is understood in this common and ordinary sense, Section 618's statute of limitations is naturally and easily read to begin running upon "the date liability originates or comes into existence." As this Court has observed, under the traditional commencement rule, the statute of limitations begins to run when the plaintiff has a "complete and present cause of action." *Rawlings v. Ray*, 312 U.S. 96, 98 (1941); *see generally* II Calvin C. Corman, *Limitation of Actions* § 11.1.1, at 134 (1991). Moreover, because a defendant's liability is the converse of a plaintiff's right to sue, *see* Gov. Br. at 13, a defendant's liability comes into existence when a plaintiff's right of action becomes complete. *See id.*; *accord* Resp. Br. at 37 n.26. Thus, as respondent concedes, *see* Resp. Br. at 22, if "arise" is understood to mean to come into existence, Section 618 expresses the traditional commencement rule.

Noting that the word "arise" can also mean "to spring up," "to come into . . . notice," or to "present itself," 1 *The Oxford English Dictionary* at 629, respondent contends that the language of Section 618 expresses a generally applicable discovery rule. Resp. Br. at 13. The meaning of statutory language is, however, "a creature not of definitional possibilities, but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). As the opening brief pointed out, Pet. Br. at 16-17, this Court has interpreted statutes of limitations commencing when a claim or cause of action "arises" to begin running when a plaintiff has a "complete and present cause of action," *Bay Area Laundry & Dry Cleaning Pension Trust*

Fund v. Ferbar Corp., 522 U.S. 192, 201 (1997), or upon the "date of injury," *McMahon v. United States*, 342 U.S. 25, 26 (1951). *See also Owens-Illinois, Inc. v. Armstrong*, 604 A.2d 47, 54 (Md. 1992) ("Giving the word its ordinary meaning, we believe that a cause of action arises when it first comes into existence."). The legal dictionary used by respondent recognizes this usage as well: according to the dictionary, when a statute of limitations uses the word "arise," the limitations period starts running "when [a] party has a right to apply to [a] proper tribunal for relief." *Black's Law Dictionary* 108 (6th ed. 1990); *see also Jamison v. Encarnacion*, 281 U.S. 635, 641 (1930) (noting that a defendant's "liability arises when one suffers injury as a result of any breach of duty owed to him for another").

Far from showing that the word "arise" is used in a different sense in Section 618, respondent fails to identify a single situation in which the word "arise" has been used to refer to a discovery rule. In fact, to petitioner's knowledge, respondent's application of this definition to a statute of limitations — which respondent did not urge in either the court of appeals or the district court below — is unprecedented. Thus, respondent does not even begin to show that her interpretation reflects the common, ordinary understanding of the language of Section 618.

Indeed, respondent fails to explain how a discovery rule can be culled out of Section 618 even if her definition of "arise" is used. Under that definition, the limitations period in the section would begin to run when "liability springs up, comes into notice, or presents itself." Although respondent contends that this occurs when "a plaintiff actually or constructively discovers that he has been injured," Resp. Br. at 10 (quotation omitted), she does not explain why that is so: the phrase created by her definition does not mention either plaintiff or discovery, and it refers to liability rather than injury. Thus, respondent's ability to identify an alternative definition of the

word "arise" does not establish that Section 618 can validly be read to incorporate a general discovery rule.

2. In their brief in support of respondent, the United States and the Federal Trade Commission do not attempt to defend respondent's analysis of the language of Section 618. Nor, for that matter, does the Government contend that this language is naturally read to incorporate a discovery rule. Instead, it simply argues that the language "will bear that construction." Gov. Br. at 6; *see also id.* at 9-15. This argument is flawed.

In the first place, the Government's argument starts from an erroneous legal premise. In contending that Section 618 will "bear" a discovery rule and then arguing that such a rule is good policy, Gov. Br. at 9, 24, the Government assumes that the text of a statute of limitations is relevant only to the extent it permits a discovery rule and that whether the statute in fact incorporates such a rule is a matter of policy left to judicial determination in light of the purpose and structure of the statute. That is not the law. As this Court has observed, "deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that the legislative purpose is expressed by the ordinary meaning of the words used." *Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 548 (1987) (quotations omitted). Thus, in the absence of "strong evidence that Congress actually intended another meaning," courts must apply the natural, ordinary meaning of the language Congress enacts, whether or not that language theoretically permits alternative interpretations. *Id.*

In addition, the Government fails to show that the language of Section 618 permits a discovery rule. In arguing that it does, the Government relies on decisions construing statutes of limitations that commence when claims or causes of actions "accrue." Gov. Br. at 10-13 (discussing *United States v. Kubrick*, 444 U.S. 111 (1979), and *Urie v. Thompson*, 337 U.S. 163 (1949)). Section 618, however, uses the word

"arise," not "accrue," and the two words are not interchangeable. As previously demonstrated, *see* Pet. Br. at 19-20, the word "accrue" is more elastic and, unlike "arise," can be interpreted to refer to the discovery rule. *See Owens-Illinois*, 604 A.2d at 53-54 (distinguishing between when a claim "arises" and when it "accrues"); *see also* Bryan A. Garner, *A Dictionary of Modern Legal Usage* 16 (2d ed. 1995) ("*Arise* may refer to the onset of the underlying wrong (e.g., exposure to asbestos), whereas *accrue* may refer to the ripeness of the claim (e.g., contraction of asbestosis or discovery of the disease)."). In short, the Government's interpretation is defective as well as illegitimate.

II. THE MISREPRESENTATION EXCEPTION ALSO SUPPORTS THE TRADITIONAL COMMENCEMENT RULE.

In addition to showing that Section 618 explicitly adopts the traditional commencement rule, the opening brief showed that the misrepresentation exception is inconsistent with a general discovery rule for two separate reasons. First, an unstated general discovery rule should not be implied into the section in the face of an explicit exception to the general commencement rule itself containing an express discovery provision. *See* Pet. Br. at 21-23. Second, a general discovery rule would, as a practical matter, deprive the misrepresentation exception of any meaningful effect. *See id.* at 23-25. Respondent and her *amici* do not cast any doubt upon the first reason, which is fatal to the construction that they urge, and they fail to undermine the second one as well.

1. In arguing that the presence of the misrepresentation exception casts doubt upon the existence of a general discovery rule, petitioner relied upon the well-established interpretive principle, which this Court has recently applied to statutes of limitations, that the presence of an express exception generally precludes implication of an unstated one. *See* Pet. Br. at 21-23 (discussing *United States v. Beggerly*,

524 U.S. 38 (1998), and *United States v. Brockamp*, 519 U.S. 347, 351-52 (1997)). Unable to dispute the validity of this principle, respondent asserts that it is not absolute and does not "necessarily rule out the finding of other implied exceptions." Resp. Br. at 35. Respondent does not, however, distinguish this Court's decisions applying the principle to other statutes of limitations or otherwise explain why it is inapplicable here.[1]

Although the Government attempts to offer such an explanation, its explanation is unpersuasive. Cataloguing the differences between the equitable estoppel doctrine, the discovery rule, and equitable tolling, the Government argues that inclusion of an exception codifying the equitable estoppel doctrine does not raise an inference that Congress intended to preclude application of a general discovery rule. Gov. Br. at 15-21; *see also* Pet. Br. at 35 (explaining why equitable tolling is inapplicable here). This Court has not, however, been concerned with such doctrinal distinctions in refusing to imply exceptions into statutes of limitations in prior cases, *see, e.g.*, *Beggerly*, 524 U.S. at 48 (finding equitable tolling barred by explicit presence of discovery rule); *Brockamp*, 519 U.S. at 351-52 (finding equitable tolling barred by presence of explicit exceptions to general commencement rule), and the

[1] Instead, respondent launches into an attack on the "'violation occurrence' rule." Resp. Br. at 36. This is a strawman that respondent employs at several times in her brief. *See id.* at 11, 17 n.10, 20, 22-29, 35-37 & n.26, 41. As the opening brief clearly stated, however, petitioner's position is not that Section 618's statute of limitations adopts a "violation occurrence" rule, but rather that Section 618 "adopts the traditional commencement rule beginning the statute when the formal right to sue under the Act attaches." Pet. Br. at 15; *see also id.* at 16 (noting that in this case the injury was suffered and the cause of action became complete when the violation occurred). Other statements by respondent and her *amici* characterizing petitioner's arguments, describing petitioner's conduct, and depicting the credit reporting industry are similarly inaccurate and unfounded.

Government offers no reason why it should be specially concerned about those distinctions in this case.

In any event, the presence of an explicit discovery provision in the misrepresentation exception raises an inference that Congress did not intend Section 618 implicitly to incorporate a general discovery rule. Congress knows how to incorporate a discovery rule into statutes of limitations clearly and unequivocally and has done so frequently. *See* Pet. Br. at 17-19 & nn.8-10. Congress did so in the misrepresentation exception in providing that the exception would delay commencement until "after discovery by the individual of the misrepresentation." 15 U.S.C. § 1681p. As Congress did not use such language in Section 618's general commencement rule but instead used the phrase "liability arises," language that it has used in the past to *distinguish* the discovery rule from the traditional commencement rule, *see* Pet. Br. at 20, the misrepresentation exception raises a natural — and powerful — inference that Congress did not intend to incorporate a general discovery rule into Section 618.

2. In addition to showing that the misrepresentation exception with its explicit discovery provision should preclude the implication of an unstated general discovery rule, petitioner also explained that a general discovery rule would render the misrepresentation exception largely redundant. Pet. Br. at 23-25. In response, both respondent and the Government offer hypotheticals about possible residual applications of the misrepresentation exception. Neither hypothetical, however, identifies a substantial independent application for the exception, which is petitioner's point.

Respondent posits discovery of "misconduct or its ramifications" in one year and of "a willful misrepresentation material to the reporting agency's extant FCRA liability" in the next. Resp. Br. at 32-33. Petitioner has not, however, argued that a general discovery rule would, as a theoretical matter, duplicate the operation of the misrepresentation

exception; it contends that such a rule would, "*[a]s a practical matter,*" operate similarly enough to deprive the exception of meaningful, independent effect. Pet. Br. at 24 (emphasis added). Because respondent's hypothetical lacks any concrete details about the injury suffered, the facts misrepresented, or their discovery, it is too abstract to undermine petitioner's pragmatic point and the interpretive inference that flows from it.

Although the Government's hypothetical is more concrete, it does not work either because it ignores the operation of the Act. In that hypothetical, a consumer who is denied credit based upon an inaccurate report from a credit agency asks the agency if it supplied a report, but is falsely told that the agency did not do so. *See* Gov. Br. at 22. Under these circumstances, the Government contends that the statute of limitations would begin running under a general discovery rule when the consumer learns that credit has been denied because the consumer would be "put on inquiry notice of the violation" at that time, but that the statute would not begin running under the misrepresentation exception until later when the consumer discovers that a report was in fact issued. *Id.*

In fact, however, the consumer should learn about the report at the same time that he discovers that credit has been denied, because the FCRA requires that consumers who are denied credit based upon a report be notified of the denial *and* of the identity of the credit reporting agency. *See* 15 U.S.C. § 1681m(a)(1) (requiring disclosure of adverse action); *id.* § 1681m(a)(2) (requiring disclosure of identity of the agency furnishing report on which adverse action based). The Government does not explain why the misrepresentation exception would apply in that situation or, if so, why it would operate differently there than the discovery rule. Even more importantly, the Government also fails to explain how in such a situation the misrepresentation exception would serve any function intended by Congress. Thus, the Government's

hypothetical fails to show that the misrepresentation exception has any meaningful role to play in the presence of a general discovery rule.

It is, of course, possible that, with more time and reflection, either respondent or the Government might come up with a concrete hypothetical in which the misrepresentation exception plays a meaningful role despite the presence of a general discovery rule. If, however, neither respondent nor the Federal Trade Commission, the agency primarily responsible for enforcing the FCRA, can easily identify such a situation, such situations must be relatively anomalous and therefore unlikely to have prompted Congress to include the exception. In any event, even if respondent could point to some meaningful role that the misrepresentation exception would play despite a general discovery rule, that fact would not affect the basic textual point that the express inclusion of a discovery provision in the exception undermines any suggestion that language adopted at the same time, in the same amendment implicitly incorporates a general discovery rule.

3. In arguing that the language of Section 618 is compatible with a general discovery rule, respondent and the Government both rely upon appellate decisions construing the Privacy Act, 5 U.S.C. § 552a. Resp. Br. at 37-39; Gov. Br. at 13-15. This reliance is misplaced.

Neither respondent nor the Government explains why this Court should look to cases under the Privacy Act, rather than the numerous cases and commentators considering Section 618 and concluding that it generally applies the traditional commencement rule. *See* Pet. Br. at 12-13 nn.4-7. These latter authorities reflect the breadth and depth of legal opinion that formed the previously settled understanding of Section 618 for the better part of two decades and that was left undisturbed (and thereby embraced) when Congress reworked the FCRA in 1996. *See id.* at 39-40. If this Court is to rely upon authority, this is the proper authority.

In any event, the Privacy Act cases cited by respondent and the Government are unpersuasive. None of them explain how a discovery rule can be culled out of the language of that statute. In all but one, there is no analysis of the text; instead, they simply declare that they are applying the discovery rule in the absence of any apparent objection by the Government. *See Bowyer v. United States Dep't of Air Force*, 875 F.2d 632, 636 (7th Cir. 1989); *Akutowicz v. United States*, 859 F.2d 1122, 11265 (2d Cir. 1988); *Englerius v. Veterans Admin.*, 837 F.2d 895, 898 (9th Cir. 1988); *Bergman v. United States*, 751 F.2d 314, 316 (10th Cir. 1984). Moreover, the remaining decision considered only whether a discovery rule would render the misrepresentation exception in the Privacy Act's statute of limitations superfluous. *See Tijerina v. Walters*, 821 F.2d 789, 798 (D.C. Cir. 1987). And the decision's contrary conclusion is irrelevant here, because it was based upon the theoretical differences between the discovery rule and the misrepresentation exception there rather than their practical operation in the context of the Privacy Act, *see id.*, which in any event differs materially from the FCRA in its notice, access, and remedial provisions. *Compare* 5 U.S.C. §§ 552a(b), (d) & (g) *with* 15 U.S.C. §§ 1681b, 1681d & 1681m-1681o. Similarly, policy arguments concerning the difficulty of discovering violations of the Privacy Act (*see Englerius*, 837 F.2d at 897; *Tijerna*, 821 F.2d at 797-98) are inapposite here because of the differences in the notice and access provisions of the two statutes. For these reasons as well, the lower court decisions construing the Privacy Act provide no basis for ignoring the language of Section 618 and the cases construing it.

III. THE POLICY ARGUMENTS OF RESPONDENT AND THE GOVERNMENT ARE IRRELEVANT AND UNPERSUASIVE.

The Government contends that a general discovery rule should be implied into Section 618 based upon its reading of

the purposes of that section and related policies. Gov. Br. at 24-30. It does not, however, contend that the ordinary meaning of the statute's language violates the clear intention of Congress or leads to a patent absurdity. Instead, assuming that this language can be read to incorporate a general discovery rule, the Government argues that such a rule would best serve the statute's purposes and policies. As that assumption is false, these arguments are irrelevant. Moreover, even considered on their own merits, the Government's arguments are unpersuasive because, among other things, they ignore the structure and history of the Act.

1. As this Court has repeatedly observed, "'[w]hen a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished.'" *Metro. Stevedore Co. v. Rambo*, 515 U.S. 291, 295 (1995) (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992)). Accordingly, where, as here, "the text alone yields a clear answer," this Court has been "reluctant to indulge an argument based on legislative purpose." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 81 (1995); *see generally Rodriguez v. United States*, 480 U.S. 522, 526 (1987). Such forbearance is especially appropriate here, because there is no suggestion of any extraordinary circumstances justifying disregard of the statute's language, and because the legislative history shows that Congress specifically considered the proper commencement rule for Section 618 — and rejected a proposal for a discovery rule in so doing. *See* Pet. Br. at 35-39. Thus, the ordinary meaning of the language of Section 618 controls.

2. In any event, the policy arguments offered by the Government are unpersuasive.

a. The Government's policy arguments ignore relevant policies. Contending that Congress' goal of "encourag[ing] the prompt presentation of claims" would not be served by commencing Section 618's limitations period before a plaintiff

suspects injury, the Government asserts that the discovery rule would serve the purposes of the statute. Gov. Br. at 25-30. That goal is not, however, Section 618's only goal. To the contrary, as petitioner pointed out, Pet. Br. at 29-30, statutes of limitations are also intended to serve the interests of defendants and the public in avoiding the litigation of stale claims and the interests of defendants in certainty and peace of mind. *See, e.g.*, *Wilson v. Garcia*, 471 U.S. 261, 271 (1985); *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). As it "frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law," *Rodriguez*, 480 U.S. at 526 (emphasis omitted); *see also Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261-62 (1993) (noting that a statute cannot be interpreted based upon "vague notions of [the] statute's 'basic purpose'"), the Government's one-sided policy argument is inadequate.

b. In addition, the Government ignores Section 609 of the FCRA, even though petitioner's brief showed (Pet. Br. at 31-32) that the section is inconsistent with any suggestion that Congress intended to permit improper disclosure claims to be brought more than two years after discovery of the disclosure.

Section 609 gives consumers the right to learn who has received their credit reports, *see* 15 U.S.C. § 1681g(a)(3), a right that is normally essential to bringing improper disclosure claims because of the inherent difficulty of discovering such disclosures. This right does not, however, extend for an indefinite period of time. To the contrary, as the opening brief pointed out, Pet. Br. at 32, Section 609 generally requires credit reporting agencies to identify recipients of reports only for the "1-year period preceding the date on which the [consumer's] request is made." 15 U.S.C. § 1681g(a)(3)(ii); *see also id.* § 1681g(a)(3)(i) (two-year period for reports requested for employment purposes). Moreover, when the FCRA was passed, agencies were generally required to

disclose recipients going back only six months. *See* FCRA, Pub. L. No. 91-508, § 609, 84 Stat. 1131. As these restrictions effectively prevent many (if not most) plaintiffs who do not request access to their files within a year or two of disclosure from bringing improper disclosure claims, they are inconsistent with a general discovery rule presumably intended to allow such claims to be brought within two years after discovery of disclosure.

In fact, Section 609 casts serious doubt upon any claim that Congress intended to incorporate a general discovery rule into Section 618. As the Government acknowledges, Gov. Br. at 27, the notice and access provisions in the FCRA help to ensure that consumers discover any injuries suffered as a result of an inaccuracy in a credit report as well as any injuries suffered as the result of the disclosure of an investigative consumer report. *See* Pet. Br. at 26-28. Consequently, a general discovery rule would apply primarily to improper disclosure claims (and, indeed, to improper disclosure claims dealing with ordinary, rather than investigative, consumer reports). As Section 609 undermines the ability of consumers to bring such claims more than two years after disclosure, it also undermines any suggestion that Congress intended to incorporate a general discovery rule into Section 618. Moreover, because the "best evidence of [congressional] purpose is the statutory text adopted by both Houses of Congress and submitted to the President," *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 98 (1991), Section 609 offers more significant evidence of Congress' purposes than any of the Government's arguments.

c. The Government's reliance upon the identity theft problem (Gov. Br. at 29) is misplaced.

First, as both respondent and the Government note, Gov. Br. at 29; Resp. Br. at 2, the issue of identity theft only became prominent in the last decade. *See, e.g.*, Fed. Trade Comm'n, *ID Theft: When Bad Things Happen To Your Good Name* 2

(Aug. 2000) [hereinafter, *ID Theft*]. It therefore cannot fairly be said that Congress was concerned with identity theft in 1970, when Section 618 was enacted. Moreover, if Congress had intended Section 618 to deal with identity theft, it could have amended the Act to do so in 1996 when the Act was overhauled. *See* Pet. Br. at 39-40.

Second, a general discovery rule is not needed to deal with the identity theft problem. When an imposter poses as a consumer, he typically obtains and then abuses credit, leaving the consumer to deal with the fallout. As a consequence, consumers victimized by identity theft are often denied credit as a result of the thief's activities or are hounded by bill collectors seeking payments evaded by the imposter. *See* Resp. Br. at 3. For example, in this case, respondent (allegedly) was denied a loan in late May 1995, Pet. App. 18a, and in October of that year, she was contacted by two collection agencies seeking to collect on separate debts due from the imposter who assumed her identity. Resp. Br. at 5, 7; ER 75, 138. Thus, a market mechanism ensures consumers will discover identity theft and thereby receive notice of any improper disclosure claims they may have under the FCRA.

No doubt anticipating this argument, the Government asserts, based upon data assembled by the Federal Trade Commission, that more than 25% of the victims of identity theft take more than a year to discover the theft. Gov. Br. at 29. That same data, however, also shows that approximately 35% of the victims of identity theft discover the theft within a month, that another 30% do so in the next five months, and that over 80% of the victims learn of thefts by the end of two years. *See* Fed. Trade Comm'n, *Identity Theft Complaint Data: Figures and Trends November 1999 through March 2001*, Figure 8, *available at* http://www.consumer.gov/idtheft/charts/nov99-mar01.pdf (last visited June 27, 2001). Thus, if the Government's figures are correct, the vast majority of identity theft victims receive

notice of their injuries long before the statute of limitations expires under a traditional commencement rule.

Third, it is neither necessary nor appropriate to distort the language of the FCRA to deal with the problem of identity theft. The primary means of dealing with that problem is not private lawsuits against credit reporting agencies; it is actions, either civil or criminal, against identity thieves. *See, e.g.*, 18 U.S.C. § 1028 (criminal); Conn. Gen. Stat. § 52-571h (civil). Moreover, because identity theft is currently the subject of legislation at both the state and federal levels, *see ID Theft* at 10-12, the problem is best left to legislatures to remedy.

3. Respondent does not contend that policy considerations demand a general discovery rule. Instead, she argues more modestly that policy supports her interpretation of the text of Section 618. Resp. Br. at 40-46. Even these limited arguments are, however, unpersuasive.

a. In addition to echoing the Government's concerns over identity theft and improper disclosures, respondent objects that the FCRA's notice and access provisions do not afford consumers enough time to bring their claims because, according to her, a consumer typically needs two years to prepare a FCRA suit. Resp. Br. at 41-43. At trial, however, respondent revealed that she filed suit within two months after contacting counsel. *See* Trial Tr. 52, 1955 (noting contact in August 1996 and filing in October 1996). As respondent fails to explain why a typical counsel would need much longer than that, her conclusory assertions concerning the time needed to bring a suit deserve no weight.

b. Respondent similarly errs in disputing petitioner's demonstration that a discovery rule would not impose a significant burden upon the credit reporting industry because the costs of data storage are "plummeting." Resp. Br. at 44-45 & n.32. In the first place, storage costs are not the only costs imposed by a discovery rule. As the opening brief pointed out,

a general discovery rule would undermine the ability of potential defendants to project their potential liabilities and require them to litigate claims that have grown stale. Pet. Br. at 29-31, 41-42. In addition, discovery rules impose transaction costs upon defendants and courts alike because they require resolution of often nettlesome questions over when injuries should have been discovered. *See id.* at 42. Finally, even if respondent's claims about the cost of data storage were substantiated by more than a press release, it would not follow that a general discovery rule would have no impact on credit reporting agencies. Given the sheer volume of information stored and processed by credit agencies — hundreds of millions of consumer credit files, more than half a billion reports each year, and more than two billion pieces of information each month, *see id.* at 30-31 — even a tiny per unit increase in the cost of data storage would cost the industry millions of dollars a year.

c. Respondent also asserts that incorporating a general discovery rule into Section 618 would not significantly add to the credit industry's burdens, because statutes dealing with credit reporting in California, Georgia, and Ohio have limitations periods incorporating the rule that already compel the necessary data storage. *See* Resp. Br. at 45. The California statute, however, sets an outside limit on the age of suits brought under it that would not be present under either of respondent's readings of Section 618, *see* Cal. Civ. Code § 1785.33 (requiring suits to be brought "not more than seven years from the earliest date on which liability could have arisen"), and the other statutes impose only limited obligations in connection with either willful violations, *see* Ga. Code Ann. § 10-1-393(b)(29), or insurance transactions, *see* Ohio Rev. Code §§ 3904.13, 3904.21(B). Thus, these limited provisions do not have the same import that the sweeping and unlimited discovery rule urged by respondent would have, and, like the rest of the policy arguments advanced by respondent and the

Government, they cannot justify departure from the plain and ordinary meaning of the language of Section 618.

IV. NEITHER RESPONDENT NOR HER *AMICI* DEFEND THE PRESUMPTION APPLIED BY THE NINTH CIRCUIT.

As the opening brief demonstrated, the strong presumption that the Ninth Circuit used in implying a general discovery rule into Section 618 has no basis in the decisions of this Court, which have not applied any presumption in favor of a discovery rule to statute of limitations that contains an explicit commencement provision. Pet. Br. at 40-45. As also demonstrated, such a presumption makes no sense in light of Congress' repeated practice of including explicit discovery provisions in statutes as well as the uncertainty about how a discovery rule would affect the balance between protecting valid claims and enabling repose struck in particular statutes of limitations. *Id.* at 41-42. Neither respondent nor her *amici* attempt to defend the Ninth Circuit's presumption, or any other presumption in favor of the discovery rule, against these objections. Indeed, the Government appears to reject the presumption. Gov. Br. at 11 n.3 (recognizing the traditional rule as the "standard" one "in most circumstances") (quotation omitted).[2]

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[2] Respondent does assert that the discovery rule applies beyond the realm of bodily injuries and medical malpractice, where "the cry for a discovery rule is loudest." *Rotella v. Wood*, 528 U.S. 549, 555 (2000); *accord Kubrick*, 444 U.S. at 126 (Stevens, J., dissenting). Although respondent relies upon *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), in doing so, she does not invoke the case's treatment of claims for lost future profits. Instead, noting *Zenith*'s statement that a cause of action accrues "if a plaintiff *feels* the adverse impact of an antitrust conspiracy," *Zenith*, 401 U.S. at 339 (emphasis added), respondent asserts that this Court implicitly adopted a discovery rule on the ground that a plaintiff "feels" an injury only when he "consciously suffers" it. Resp. Br. at 19-20. This is frivolous. Far from suggesting that an injury must be

V. RESPONDENT'S ACTUAL DAMAGES ARGUMENT IS NOT PROPERLY BEFORE THIS COURT AND, IN ANY EVENT, WITHOUT MERIT.

No doubt recognizing the flaws in her attempt to read a discovery rule into Section 618 and in the presumption applied by the Ninth Circuit, respondent advances a new, alternative argument in her opposition brief. While asserting that petitioner breached her "financial privacy" and that these breaches facilitated the theft of her identity, *see* Resp. Br. at 4, respondent also contends that she did not suffer any "actual damages" cognizable under the FCRA until she realized that her privacy had been invaded by the allegedly improper disclosure of her credit records. *See id.* at 22-29. This new argument is not properly before this Court and, in any event, is meritless.

Although a party that prevailed below can go beyond the question presented in defending the judgment at issue, as a general rule, this Court "will not consider a claim that was not presented to the courts below." *Jenkins v. Anderson*, 447 U.S. 231, 234 n.1 (1980); *see generally* Robert L. Stern *et al.*, *Supreme Court Practice* 344 (7th ed. 1993). As respondent did not advance her "actual damages" argument in either the district court or the court of appeals, this argument should not be considered here. First, respondent does not cite any lower court decisions pertinent to her argument, and petitioner is unaware of any. As a consequence, this Court lacks the

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consciously suffered to trigger the limitations period, *Zenith* states that future damages accrue "on the date they are suffered," without any reference to consciousness. *Zenith*, 401 U.S. at 339; *see also id.* at 338 (noting that a claim accrues "each time a plaintiff is injured"). Thus, as this Court has noted, *Zenith* articulates the traditional "injury occurrence" rule, not a discovery rule. *See Rotella*, 528 U.S. at 553-54 & n.2; *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 198 (1997) (Scalia, J., concurring in part and concurring in the judgment).

benefit of the views of the lower courts on this argument. Second, focusing largely on strawman arguments concerning the "violation occurrence" theory not advanced by petitioner, *see supra* p. 6 n.1, respondent ignores the real issue raised by her new argument, which is whether an invasion of privacy unknown to its victim constitutes a cognizable injury sufficient to warrant a damage award under the FCRA and therefore to start the Act's statute of limitations running. On that issue, she simply asserts in a footnote, without argument or authority, that the "unwitting victim suffers no actual damages unless and until some personal realization occurs, usually through discovery." Resp. Br. at 24 n.17. As this conclusory assertion offers no real guidance to petitioner or to the Court, this Court should decline to address it and, instead, treat respondent's actual damages argument as waived below.

In any event, the actual damages argument is without merit. As noted above, respondent contends that the allegedly improper disclosure of her credit reports breached her financial privacy, and it is hornbook law that an individual may recover damages not only for emotional distress and pecuniary harm resulting from an invasion of privacy, but also for the "harm to his interest in privacy resulting from the invasion." *Restatement (Second) of Torts* § 652H (1977).

Nor is there any reason to think that, by providing for recovery of "actual damages," Congress intended to prevent consumers from receiving compensation for such injuries under the FCRA. The term "actual damages" refers to amounts awarded to "compensate for a proven injury or loss." *Black's Law Dictionary* 394; *see also Birdsall v. Coolidge*, 93 U.S. (3 Otto) 64, 64 (1876) (interpreting "actual damages" to refer to damages resulting from "injury alleged and proved"). Thus, the term is used to distinguish compensatory damages from punitive and nominal ones, *see, e.g., Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 121 S. Ct. 1678, 1686, 1688 (2001) and, in the defamation and privacy contexts, to

distinguish unproven "presumed" damages from proven ones, *see, e.g.*, 2 Rodney A. Smolla, *Law of Defamation* § 9:22, at 9-11 (2000). Consequently, the actual damages requirement does not preclude a plaintiff from seeking damages due to improper disclosure of her purchasing habits and other private financial information and therefore does not save the judgment below.

CONCLUSION

For the foregoing reasons, and those stated in petitioner's opening brief, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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